

**IN THE INCOME-TAX APPELLATE TRIBUNAL
BANGALORE BENCH 'A', BANGALORE**

**BEFORE HON'BLE VICE PRESIDENT SHRI N.BARATHVAJA SANKAR,
VICE PRESIDENT SHRI G.C.GUPTA
AND
SMT. P MADHAVI DEVI, JUDICIAL MEMBER**

**I.T.A. No.546(Bang.)/2008
(Assessment Year : 2003 -2004)**

M/s Nandi Steels Limited,
F4, Richmond Plaza,
Richmond Circle,
Bangalore-560 025.
PAN No.AAACN4849D

Appellant

Vs

The Assistant Commissioner of Income-tax,
Circle-12(2),
Bangalore

Respondent

**For Assessee by : Shri S. Ramasubramanian, CA
For Revenue by : Shri G.V.Gopala Rao, CIT-I**

**Date of hearing : 17-10-2011
Date of pronouncement : 09-12-2011**

ORDER

PER SMT. P. MADHAVI DEVI, JM;

The present Special Bench has been constituted u/s 255(3) of the IT Act, 1961. The Special Bench was constituted under the following circumstances.

2. The assessee company which is engaged in the business of manufacture/production of Iron and Steel has filed its return of income for the relevant assessment year on 14-10-2003, declaring an income of

Rs.98,27,270/- under the head 'capital gains'. The return was processed u/s 143(1) on 20-01-2004 and a refund of Rs.4,77,163/- was issued. Subsequently, the AO noticed that the assessee had set off the long term capital gains of Rs.43,36,640/- against the brought forward business loss and depreciation contrary to the provisions of Sec.72 of the IT Act. In view of the same, the AO believed that the income chargeable to tax has escaped assessment within the meaning of Sec.147 and issued notice u/s 148 on 8-07-2005. In response to notice u/s 148, the assessee filed its return of income on 17-04-2006 as returned in the original return of income. The assessee also requested the AO to furnish a copy of the reasons recorded for re-opening of the assessment. The AO furnished the reasons recorded for reopening of the assessment to the assessee. In the proceedings u/s 143(3) read with Sec.148 of the IT Act, the AO held that the brought forward business loss and unabsorbed depreciation cannot be set off against the income from capital gains. He observed that the assessee has sold the land situated at Tumkur road along with the building and bore well which were all used for the business. Taking note of the decision of the Hon'ble Apex Court in the case of M/s Killick Nixon & Co., Vs CIT reported in 66 ITR 714(SC), wherein it was held that only income which is earned by carrying on business is entitled to be set off, he held that the carry forward business loss cannot be set off against the income from capital gains, as it is against the provisions of law. He also observed that the assessee has admitted the profit and sale of land etc.

as long term capital gains and offered to tax at the rate of 20%. He accordingly, computed the income of the assessee.

3. Aggrieved, the assessee preferred an appeal before the CIT(A) who confirmed the order of the AO and the assessee came in appeal before the Tribunal.

3.1 Before the Tribunal, the assessee has raised various grounds relating to validity of the assessment u/s147 of the Act and also with regard to disallowance of the set of carry forward business loss and depreciation against the long term capital gains arising from the sale of land and buildings used for the purpose of business. The Division Bench of this Tribunal vide its reference dated 11-12-2008 have decided the first four grounds of appeal and also the additional ground of appeal raised by the assessee and with regard to ground no.5 & 6 a reference was made to the Hon'ble President for the constitution of a Special Bench of the Tribunal. The reasons for the reference was that the assessee has relied upon the decision of the Bangalore Bench of the Tribunal in a reported case of M/s Steelcon Industries (P) Ltd., Vs ITO dated 27-12-2004 in ITA No.571(Bang.)1989 for the assessment year 1985-86, wherein the issue was decided in favour of the assessee holding that the carry forward loss can be set off against the income from capital gains. For coming to this conclusion, the Tribunal has followed the decisions of the Hon'ble Supreme Court in the case of CIT Vs Cocanada Radhaswami Bank (1965) 55 ITR 17(SC) and CIT Vs

Chugandas & Co.,(1965) 55 ITR 17(SC). The Division Bench however, noticed that there is another judgment of the Hon'ble Supreme Court in the case of CIT Vs Express Newspapers Ltd.,53 ITR 250(SC) wherein it was held that the capital gains are connected with the capital assets of the business and therefore, it cannot make them the profit of the business and cannot be set off against the carry forward business loss. Having observed that the Bench of the Tribunal at Bangalore in the case of M/s Steelcon Industries Ltd.,(supra) has not considered the decision of the Hon'ble Supreme Court in the case of Express Newspapers Ltd., cited supra, the Division Bench felt that the decision of the Tribunal in the case of M/s Steelcon Industries Pvt.Ltd., requires re-consideration by a Special Bench constituting of three Members for a decision. Thus, they referred the grounds of appeal nos.5 & 6 to the Special Bench. The Hon'ble President of ITAT after considering the reference in detail u/s 255(3) made by the Division Bench of this Tribunal (vide order dated 11-12-2008 constituted a Special Bench) for disposal of the ground nos.5 & 6. We accordingly, proceed to decide the appeal.

4. Ground no.5 & 6 raised by the assessee in the appeal are as under;

“Ground no.5: That the learned CIT(A) erred in law and on facts that the appellant is not entitled to set off carry forward business loss of Rs.39,99,652/- against the long term capital gain arising on sale of land used for the purpose business”.

Ground no.6: That the authorities below ought to have appreciated that there is no cessation of business and the appellant is entitled to set off the carry forward business loss”.

5. The learned counsel for the assessee Shri S.Ramasubramanian, submitted that during the previous year relevant to the assessment year 2003-04, the assessee sold the land, building and bore well of the assessee used for its business purposes for a consideration of Rs.1,55,00,000/-. He submitted that the assessee had claimed depreciation in the earlier years on the building and the bore well. According to him, the factory building and plant & machinery stood on the same land and since these assets were connected to the business of the assessee, the gain from sale of these assets has been rightly set off against the carried forward business loss from the earlier years. According to him, the long term capital gains on transfer of business assets had the character of business income and therefore, business loss brought forward from earlier years can be set off against such income though, it was not computed under the head “ profits and gains of business or profession”. In support of his contention, he placed reliance upon the following decisions;

1. United Commercial Bank Ltd., 32 ITR 688
2. Chugandas & Co., 55 ITR 17
3. Cocanada Radhaswami Bank Ltd., 57 ITR 306

6. He also drew our attention to the rationale laid down by the Hon'ble Apex Court's decision to the effect that though the income was

computed under the different heads of income, but when it has the character of business income, the brought forward business loss can be set off against such income. He submitted that the decision of the Hon'ble Supreme Court in the case of CIT Vs Express Newspapers Ltd., cited supra, was considered by the subsequent bench of the Supreme Court in the case of CIT Vs Cocanada Radhaswami Bank Ltd., cited supra and after taking into consideration of the same, it has been held that the break up of income under different head is only for the purpose of computation of total income and it does not cease to be income from the business.

7. Another argument put forth by the learned counsel for the assessee is that Sec.72 of the Act permits the carry forward of unabsorbed loss and clause-(i) thereof permits set off of such loss from the income, if any, of any business of the assessee. Therefore, according to him, it is enough, if such profits and gains have a nexus with business. He also submitted that whenever legislature wanted to refer to a particular head, it specifically stated so. He drew our attention to the reference to the head 'profits and gains of business or profession' in the explanation (baa) to sec.80HHC, wherein while defining the profits of business it is provided that it means the profits of business as computed under the head 'profits and gains of business or profession'. He submitted that the similar expression is used in clause-(d) of the Explanation to sec.80HHE. Thus, according to him, since sec.72 does not state that the loss can be set off only from income

computed under the head “profits and gains of business or profession”, it can be set off against the profits and gains of business or profession even if it is computed under any other head of income.

8. The other argument raised by the assessee is that the lower authorities have rejected the claim of the assessee mainly on the ground that the assessee has not carried on the business during the previous year ending 31-03-2002 and therefore, the decisions of the Hon'ble Supreme Court in the cases of United Commercial Bank and Cocanada Radhaswami Bank Ltd (cited supra) and that of Bangalore Bench in the case of M/s Steelcon's case are not applicable. He submitted that this finding of the lower authorities is incorrect because, the AO himself has determined the loss of Rs.9,67,922/- under the head 'profits and gains from business or profession' and this is a pointer to the fact that the assessee had carried on the business during the year ending 31-03-2003. He thereafter, drew our attention to the details of turnover effected by the assessee during various financial years till 31-03-2009 to demonstrate that during the financial year 2003-04 the turnover was Rs.33,09,862/- for the assessment year 2007-08 it was Rs.8,02,775/- for assessment year 2008-09 it was Rs.86,40,160/-. He submitted that there was no turnover during the financial years : 2000-01,2001-02 and 2002-03 and that this only shows that there was a temporary lull in the business of the assessee and it does not amount to closure of the business. For this proposition, the assessee placed reliance upon the following decisions;

1. *CEPT Vs Srilakshmi Mills Ltd., 20 ITR 451 (SC)*
2. *CIT Vs Vikram Cotton Mills Ltd.,(1988) 169 ITR 597(SC)*
3. *M/s Lakshmi Narayan Board Mills Pvt.Ltd., Vs CIT (1994) 205 ITR 88(Cal.)*
4. *M/s Karsondas Ranchhoddass Vs CIT (1972) 83 ITR 1(Bom)*
5. *L.VE Vairavan Chettiar Vs CIT (1969) 72 ITR 114(Mad.)*
6. *M/s Emdee Exports Vs Eleventh Income Tax Officer (1985) 13 ITD 8(Bang.)*

8.1. The learned counsel for the assessee therefore, prayed that the grounds of the appeal of the assessee before the Special Bench may be allowed.

9. The learned DR on the other hand, supported the orders of the authorities below and submitted that the assets sold by the assessee are in fact capital assets and therefore, the assessee by itself offered the income from the sale of these assets under the head “capital gains and has also paid taxes at the rate at which capital gains are taxed. He submitted that any gain or loss on the sale of a capital asset cannot be referred to as business income and it cannot be set off against the brought forward loss of earlier years. He drew our attention to the provision of Sec.72 of IT Act to demonstrate that it is only business income against which the brought forward loss can be set off. He strongly relied upon the judgment of the Hon’ble Supreme Court in the case of M/s Express Newspapers Ltd., (cited supra) and submitted that the findings of the Hon’ble Supreme Court should be considered in the light of the facts and circumstances before the Hon’ble Court. He also

submitted that in both the cases i.e M/s United Commercial Bank Ltd., and M/s Cocanada Radhaswami Bank Ltd., the capital gains were on account of sale of securities and the Hon'ble Supreme Court has taken note of the fact that these securities were in fact trading assets of the assessee's therein and therefore, though the income was to be taxed under the head "Income from securities" it does not lose the character of business income and therefore, brought forward loss of earlier years can be set off against such income. He submitted that in the case before us, assets were fixed assets as shown in the balance sheet of the assessee and were undoubtedly capital assets. He submitted that the assessee even claimed depreciation on the building and bore well in the earlier years. He submitted that merely because, there is a nexus between the business carried on by the assessee and the assets sold, the gains on the sale of such assets cannot get the character of business income. Thus, according to him, the findings of lower authorities are to be upheld.

10. Having heard both the parties and having considered the rival contentions and the material on record, we find that the only question before us for consideration is whether the brought forward loss from the earlier years can be set off against the income from "capital gains" u/s 72 of the IT Act. For the purpose of ready reference, the relevant portion of sec.72 is reproduced here under;

“ 72 (1) Where for any assessment year, the net result of the computation under the head “Profits and gains of business or profession” is loss to the assessee, not being loss sustained in a speculation business, and such loss cannot be or is not wholly set off against income under any head of income in accordance with the provisions of sec.71, so much of the loss as has not been so set off or .. where he has no income under any other head, the whole loss shall, subject to the other provisions of this Chapter, be carried forward to the following assessment year, and –

(i) it shall be set off against the profits and gains, if any , of any business or profession carried on by him and assessable for that assessment year;....

Much stress has been laid by both the parties on the term “profits and gains if any, of any business or profession” mentioned in sub-clause –(i) of sub-sec.(1) of sec.72 of the IT Act. What are the profits and gains of business or profession ?. Whether it should be the income earned out of the business carried on by the assessee or it may be the income in any way connected to the business or profession carried on by the assessee ?. The answer to this question entirely depends on the interpretation to be given to the term “of any business or profession carried on by the assessee and assessable for that assessment year” for determination of the issue. It is not in dispute that the land, building

and bore well sold by the assessee were used by the assessee for its business purposes. It is also not disputed that these assets were fixed assets of the assessee. The only argument of the assessee has been that they have direct nexus with the business carried on by the assessee and therefore, are business assets and any gains from the sale of such assets would also have the character of business income. We are unable to agree with this contention of the assessee that the assets sold by the assessee were business assets. Undisputedly, they were capital assets and the capital receipts are not taxable nor are the capital payments deductible from the income of the assessee. The capital is to be used for the purpose of carrying on the business of the assessee and it shall remain in the business of the assessee till it is either converted into stock-in-trade or is disposed off. The income earned by the assessee by carrying on the business by use of the stock in trade only is the business income of the assessee. Likewise, any expenditure incurred by the assessee for carrying on of business and for earning the income from such business or profession is only allowable as deduction. After taking into account the receipts and payments for carrying on the business of the assessee only the profit or gain or loss from the business is computed. If the profit or loss relate to the same assessment year from one source then it can be set off from another source under the same head of income u/s 70 Act, and it can be set off against the income from any other head of income u/s 71 of the Act. Sec.72 of the Act however, permits the carry forward business loss to subsequent

assessment years and allows it to be set off against profit & gains, if any, of any business or profession carried on by the assessee and assessable for the relevant assessment year. Thus, it is clear that it is only the business loss that can be carried forward u/s 72 of the Act and it can also be set off only against the business income of the assessee, be it from the same business or from any other business. In the cases relied upon by the learned counsel for the assessee, the Hon'ble Supreme Court was dealing with the cases of the assessee's whose business was dealing in securities also and it was thus held that these securities were trading assets and therefore, the income therefrom though to be computed under the head "income from securities" does not lose the character of "business income". But in the case of M/s Express Newspapers Ltd., cited supra, the facts of the case are little different and after taking into consideration the facts of the case therein, the Hon'ble Supreme Court has held that the capital gains on sale of capital assets is not to be set off against the brought forward loss of earlier years. In our opinion, the decision of the Hon'ble Supreme Court in the case of M/s Express Newspapers Ltd., is fairly applicable to the facts of the case before us. The Coordinate Bench of the Tribunal in the case of M/s Steelcon Industries Pvt.Ltd., cited supra, has misplaced its reliance upon the decision of the Apex Court in the cases of M/s United Commercial Bank Ltd., and M/s Cocanada Radhaswami Bank Ltd., In view of the same, we are inclined to reject the grounds of

appeal nos.5 & 6 raised by the assessee. Thus, the reference is answered in favour of revenue.

11. The case is now to be posted before the Division Bench to give effect to the order of the special Bench and also to give effect to the order of the Division Bench on the grounds of appeal nos. 1 to 4 decided by it while making the reference to the Hon'ble President for the Constitution of a Special Bench.

(N.BARATHVAJA SANKAR) (G.C.GUPTA) (SMT. P. MADHAVI DEVI)
VICE PRESIDENT VICE PRESIDENT JUDICIAL MEMBER

Place: Bangalore

Dated: 09-12-2011

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Copy to :

1. The Assessee
2. The Revenue
3. CIT(A)
4. CIT
5. DR
6. GF(B'lore)

By Order

AR, ITAT, BANGALORE